

Rules Pursuant to 39 U.S.C. 404a

FREDERICK FOSTER'S OPINION ON THE PRC
NOTICE OF PROPOSED RULEMAKING
ESTABLISHING RULES PURSUANT TO 39 U.S.C. 404a

Frederick Foster, creator of the Virtual P.O. Box Initiative, basic list of concerns with the PRC Proposed Order No. 1739.

1. I believe these violations are rarely committed by the USPS since there are only a few "new things under the sun" and they are mostly technological advances.
2. The PRC Order No. 1739 "Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. §404a" is clear indication that the current statute did not suggest or give the PRC any sense of exclusive jurisdiction on these allegations. This PRC proposal contradicts the assertions of the US Attorney's Office who when unlawfully representing the Postal Service in district court has made false entries claiming that complaints pertaining to 39 U.S.C. §404a should be brought before the PRC because the district courts does not have jurisdiction. The enactment of this proposal will only intensify the façade created by members of the Postal Eco System, that these complaints should not be heard in the district courts or outside the Postal Eco System.
3. The PRC governing allegations pertaining to 39 U.S.C. §404a is a complete contradiction to the Postal Service's private status and its Congressional relief intended to allow them to fairly compete in the private sector or open market. In order to maintain fair competition in the private sector, the venue for filling a complaint of unfair or deceptive acts or practices must be the same venue as anyone in the private sector. Technically, the PRC governing 39 U.S.C. §404a complaints will be an extension of the alleged unfair competition, deceptive act or practice due to the venue being the PRC and its jurisdictional limitations. The PRC governing 39 U.S.C. §404a complaints made by members of the private sector against the Postal Service will simply be "Unfair".

4. The PRC completely extracting or dissecting 39 U.S.C. §404a from the body of Section 403 Unfair Competition Prohibited, followed by Section 404 Suits By and Against the Postal Service is not the Congressional intent or the American way. The PRC would be more instrumental regulating the Postal Service as opposed to “governing the 404a complaints against them”. Whenever and where ever 404a complaints are filed, the PRC should investigate these claims and presenting their findings to the authority of the court where the complaint was filed. This vital role can be considered an extension of PRC’s current duties of keeping the Postal Service operations within the scope and provisions of the US Code or the PAEA.
5. The PRC, with its current status pertaining to its jurisdiction on these complaints, obviously is not making this proposal in the best interest of the person making the complaint. The PRC has had ample opportunity to find the cause for these complaints. Many complaints could be prevented with a few adjustments to the Postal Service’s procedures. The USPS Strategic Planning Supplying Principles and Practices Manual (SP&P) directs USPS employees to "1-3 Identify key stakeholders"(SCM) and "1-6 Involve suppliers early" in reference to consideration of newly proposed products or services, this poses an immediate violation of 39 USC 404a when the new product or service is based a private person's intellectual property. 39 U.S.C. §404(a)(2) prohibits the Postal Service from compelling the disclosure of intellectual property or proprietary information to any third party. The USPS SP&P Manual instructs Postal employees to compel the disclosure of intellectual property/proprietary information when the Postal Service considers implementing the information.
6. The prescribed "practice" of the USPS SP&P also makes the supplier whom the USPS "involves" (discloses a person's intellectual property to) a "state actor" and they must be held accountable same as the USPS under these circumstances.
7. The next consideration is, "Does the PRC have the jurisdiction to hold USPS suppliers of the private sector accountable?" If not, this type of complaint needs be in the Federal District Courts.
8. Then, in reference to unfair practices, deceptive acts, can the PRC remove the Postal Service's cloak of sovereign immunity and will the USPS be considered a person?

9. The PRC governing the complaints alleging violations of 39 U.S.C. §404a will be a risk to the integrity and the sovereign immunity of the PRC. In a case where the PRC makes a decision in favor of the Postal Service and the decision is based on consideration of inaccurate information, allegations can rightfully arise that the PRC acted or is acting on behalf or in concert with the Postal Service. 39 U.S.C. §404(e)(1) *“To the extent that the Postal Service, or other Federal agency acting on behalf of or in concert with the Postal Service, engages in conduct with respect to any product which is not reserved to the United States under section 1696 of title 18, the Postal Service or other Federal agency (as the case may be)—*

“(A) shall not be immune under any doctrine of sovereign immunity from suit in Federal court by any person for any violation of Federal law by such agency or any officer or employee thereof; and

“(B) shall be considered to be a person (as defined in subsection (a) of the first section of the Clayton Act) for purposes of—

“(i) the antitrust laws (as defined in such subsection); and “(ii) section 5 of the Federal Trade Commission Act to the extent that such section 5 applies to unfair methods of competition”. The enactment of the PRC proposed Order No. 1739 will only complicate these matters.

10. 39 U.S.C. clearly dictates the powers of the PRC in reference to the Postal Service.

These powers are basically limited to scheduled evaluations and analysis of Postal Operations and their request, reporting findings to US Executive and legislative departments, and “Service and Rates Complaints”. The PRC does not have the power to force the Postal Service to do anything new or different no matter how great the need or benefits may be. The focus of the PRC should be governing the Postal Service.

11. It appears Order 1739 is intentionally or incidentally designed to diminish the level of justice a private person can receive when filing an Unfair Competition claim against the Postal Service. Though allegation of violations of 39 U.S.C. §404a against the USPS may be rare making the statute un-popular, the value of the intellectual property or proprietary information pertaining to the allegations can be worth \$Billions of Dollars. The PRC proposal can be mistaken as a clever, collective attempt, by members of the Postal Eco-System, to issue an official proposed order seeking jurisdiction on allegations

of violation of statutes that rarely occur and only a few people care about, while having a self-serving hidden agenda, intending to act on behalf or in concert with the Postal Service by reducing or protecting them from the penalties they would receive in the district courts. The US Attorney already exaggerates 3662 by asserting that all 404a claims must be brought before the PRC. This will only fortify the US Attorney's inaccurate assertions and make the district court's more incline to accept the false assertions as true. This, in essence, will only hurt the Plaintiff.

12. Order 1739 presents issues of little to no relevance and reasons of surface value to support the PRC governing complaints relating to 39 U.S.C. §404a. The GameFly complaint was a rate and service complaint. Accelerating the adjudication process for claims of damages of a few \$Thousand Dollars or less is a thought, but would be a disservice to claims of damages ranging in the \$Millions or \$Billions of Dollars.
13. The United States Postal Service is one of if not the world largest, most trusted institutions or corporations. It has an Innovations Department, Data Base, and Internet link that can attract some of the world's most innovative minds. As a competitor in the private sector, it must be held accountable for the intellectual property it is trusted with.
14. Will the Postal Service be required to hire private counsel? 39 U.S.C §404(g)(1) states, *"Notwithstanding any other provision of law, legal representation may not be furnished by the Department of Justice to the Postal Service in any action, suit, or proceeding arising, in whole or in part, under any of the following: "(A) Subsection (d) or (e) of this section"*. The subsection which this statute refers to pertains to Unfair Competition, unfair or deceptive acts or practices.
15. Will the PRC have the power to provide Injunctive Relief or issue Cease and Desist Orders in cases where the Postal Service individually or jointly with another government agency or private entity has violated the statutes? Since the Postal Service serves the Nation, it is highly unlikely these types of orders will be issued because the needs of the public may out way the needs of the person who owns the intellectual property.
16. The suggested role the Postal Regulatory Commission should perform is taking appropriate measures to prevent complaints alleging violations of 39 U.S.C. §404a from

17. In my opinion, the PRC should not govern complaints alleging violations of 39 U.S.C. §404a as it would be unfair to the Plaintiffs. The PRC should take preventive measures and regulate Postal Operations that could lead to these allegations.

Respectfully Submitted,

Frederick Foster